Supreme Court, U.S.
FILED
DEC 7 1994
OFFICE OF THE CLERK

No. 94–849

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH M. MCDADE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

THOMAS J. SPULAK,
General Counsel.
CHARLES TIEFER (Counsel of Record),
Deputy General Counsel and Solicitor.
RICHARD P. STANTON,
LENORE D. DICK,
Assistant Counsels.
U.S. House of Representatives,
The Capitol, H–112,
Washington, D.C. 20515.
(202) 225–9700

Attorneys for the Speaker and Bipartisan Leadership Group.

DECEMBER 1994

QUESTION PRESENTED

Does the Speech or Debate Clause's protection of a Member of Congress against being "questioned in any other Place" allow indicting him for his legislative committee role and legislative oversight activity?

TABLE OF CONTENTS

	Page
Question Presented	I
Table of Cases and Authorities	III
Interest of the Amici Curiae	1
Statement of the Case	2
Summary of Argument	7
Reasons For Granting the Writ	7
1. The Third Circuit Has Split With the Eleventh Circuit Regarding An Important Constitutional Question Concerning the Separation of Powers	7
2. This Court Should Repair the Damage Done to the Protection For Congressional Oversight	11
Conclusion	15

TABLE OF CASES AND AUTHORITIES

Cases:

Bowsher v. *Synar*, 478 U.S. 714 (1986)	1, 4
Doe v. *McMillan*, 412 U.S. 306 (1973)	8
Eastland v. *United States Servicemen's Fund*, *421 U.S. 491 (1975)*	*passim*
Gravel v. *United States*, 408 U.S. (1972)	8
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	14
Hutchinson v. *Proxmire*, 443 U.S. 111 (1979)	8
Sinclair v. *United States*, 279 U.S. 263 (1929)	11, 12
United States v. *Brewster*, 408 U.S. 501 (1972)	14
United States v. *Helstoski*, 442 U.S. 477 (1979)	7
United States v. *Johnson*, 383 U.S. 169 (1966)	7, 10
United States v. *Swindall*, 971 F.2d 1531 (11th Cir. 1992), cert. denied 114 S.Ct. 683 (1994)	*passim*
Watkins v. *United States*, 354 U.S. 178 (1957)	12

Constitution, Statutes, and Legislative Materials:

U.S. Const., art. I., § 6, cl. 5	*passim*
House Rule X	2

Page

Miscellaneous:

Department of Defense Appropriations for 1990, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations, 101st Cong., 1st Sess. Part 6 (1989) 6

Department of Defense Appropriations for 1992, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations, 102d Cong., 1st Sess., Part 6 (1991) 6

Department of Defense Appropriations for 1993, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations, 102d Cong., 2d Sess., Part 4 (1992) 6

GAO, *Battlefield Automation: Army Command and Control Systems Acquisition Cost and Schedule Changes,* GAO/NSIAD–88–42FS, December 1987 .. 5, 6

GAO, *Separate Army and Air Force and Air Force Airborne SINCGARS Programs May Be Uneconomical,* GAO/NSIAD–85–50, January 31, 1985 5

GAO, *Battlefield Automation: Status of the Army Command and Control System Program,* GAO/NSIAD–86–184FS, August 1986 5

GAO, *DOD Acquisition Program: Status of Selected Systems,* GAO/NSIAD–88–160, June 1988 6

GAO, *Combat Radios: Army's Selection of SINCGARS' Second-Source Contractor,* GAO/NSIAD–88–200, July 1988 6

GAO Reports: *Communication Acquisition: Army Still Needs to Determine Battlefield Communications Capability,* GAO/NSIAD–93–33 (November 1992) 6

1993 DOD Budget: Potential Reductions in Command, Control, and Communications Programs, GAO/NSIAD–92–297BR (September 1992) 6

Communications Acquisitions: Army Needs to Ensure Economy in SINCGARS Radio Procurement, GAO/NSIAD–91–119 (June 1991) 6

Battlefield Automation: Army Tactical Command and Control System's Schedule and Cost, GAO/NSIAD–91–118BR (April 1991) 6

Communications Acquisition: Issues Invoking Army's Single Channel Ground and Airborne Radio System, GAO/NSIAD–90–BR (March 1990) 6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94–849

JOSEPH M. MCDADE

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES, AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF THE AMICI CURIAE

The Speaker and Bipartisan Leadership Group of the House of Representatives ("House *amici*")[1] have been a regular mechanism for the House to present its institutional position in litigation. *See, e.g., Bowsher* v. *Synar,* 478 U.S. 714 (1986); *United States* v. *Swindall,* 971 F.2d 1531 (11th Cir. 1992), *cert. denied,* 114 S.Ct. 683 (1994). This appeal presents issues of importance for the committee system of the House of Representatives. House *amici* participated in the briefing and argument of this case, both in district court, *United States* v. *McDade,* 827 F. Supp. 1153 (E.D. Pa. 1993), (A–62 to A–158), and before the panel of the court of appeals. *United States* v.

[1] The amici curiae are the Honorable Thomas S. Foley, Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives, consisting of the Honorable Richard A. Gephardt, Majority Leader; the Honorable Robert H. Michel, Republican Leader; the Honorable David E. Bonior, Majority Whip; and the Honorable Newt Gingrich, Republican Whip.

McDade, 28 F.3d 283 (3d Cir. 1994) (one judge dissenting), (A–1 to A–61.) House *amici* also participated in the briefing of the petition for rehearing *en banc*, *reh'g en banc denied*, 28 F.3d 283, 305 (3d Cir. 1994) (four judges dissenting), (A–159 to A–160).

STATEMENT OF THE CASE

A divided panel of the Third Circuit split with the Eleventh Circuit on a fundamental aspect of the Speech or Debate Clause. Since the root of the issue is the content of the Indictment regarding Representative McDade's role and activities as Ranking Minority Member on the House Subcommittee on Defense Appropriations and the House Small Business Committee, and the oversight activity of the Defense Appropriations Subcommittee, a statement of the case appropriately describes these.

In its structure, its theories, and its emphasis, the Indictment focuses on Representative McDade's committee role. The Indictment consists of five counts. Its RICO count, Count Five, builds on two conspiracy counts, Counts One and Three, each of which connects to one of two gratuity counts, Counts Two and Four. The Indictment charges Representative McDade with receiving various gratuities and with conspiracy, but it does not stop there, as prior indictments of Members of Congress have stopped; it uses his committee assignments and oversight activity against him. Count Three relies upon the allegation that "[i]n or about January, 1985, defendant McDADE became ranking minority member of the House Appropriations Committee, Subcommittee on Defense Appropriations."[2] The House of Representatives establishes, by House Rule X, the Defense Appropriations Subcommittee to conduct the annual legislative cycle for the $300 billion defense appropriation bill, with the accompanying oversight.

---

[2] This is first alleged in Count One, para. 3 at 2; in Count Three, it is realleged by incorporation in Count Three, para. 1 at 16.

Count One also relies upon the defendant's committee leadership assignment, starting, in para. 2 of the Indictment, with "Beginning in or about 1982, defendant McDADE was ranking minority member of the House Small Business Committee." Indictment at 1. This count focuses both on the office of Ranking Minority Member for the House Small Business Committee, and on the Ranking Minority Member's committee staff. Count Five's RICO charge defines the defendant's racketeering "enterprise" squarely in terms of his legislative committee assignments. It defines the enterprise as follows, in pertinent part:

THE ENTERPRISE

> 3. Defendant JOSEPH M. McDADE . . . supervised the activities of Congressional staff members who worked at his direction on the *congressional committees* on which he held *official positions.* Defendant JOSEPH M. McDADE, together with these offices and individuals, constituted an enterprise as defined in Title 18, United States Code, Section 1961(4).

Indictment, Count Five, para. 3 at 24 (emphasis added). Count Five begins by realleging the pertinent portions of Counts One and Three, the conspiracy counts, so when it speaks of "congressional committees," it realleges the previous identifications of the congressional committees.

The Indictment draws heavily on the Defense Appropriations Subcommittee's legislative oversight regarding the SINCGARS (walkie-talkie)[3] program. In particular, it alleges a 1988 letter by the House Defense Appropriations Subcommittee's Ranking Minority Member as the key[4] overt act in Count Three:

---

[3] SINCGARS (Single Channel Ground and Airborne Radio System) is planned to be the Army's next generation of very high frequency combat radios, like the famous "walkie-talkies" of past wars.

[4] In what is otherwise largely a list of things allegedly provided to the defendant, like transportation from Washington to Philadelphia or from Scranton to Washington, this particular overt act sticks out

Continued

> 17. On or about June 7, 1988, defendant McDADE, wrote to the Secretary of the Army requesting that the Army delay in making a final decision on a possible "second source" for the SINCGARS program.

Indictment, Count Three, Overt Acts, para. 17 at 22. The Subcommittee functions through such correspondence, in the times between public and formal events like hearings and meetings.

In this letter, Representative McDade, as the Defense Appropriations Subcommittee's Ranking Minority Member, discusses the essence of the intent of committee legislative activity and its continuing legislative investigation. "The Committee has received interim reports from [the General Accounting Office,] GAO, and the Army has completed its source selection. However, the GAO's final report will not be completed until July 15th." House *amici* district court brief, Exhibit 1.[5] When the Indictment alleges that "defendant McDADE, wrote to the Secretary of the Army requesting that the Army delay in making a final decision," Indictment, Count Three, Overt Acts, para. 17 at 22, the prosecution means to show as criminal this writing.

> Our [Defense Subcommittee] intent throughout in monitoring the second source strategy and assigning a GAO review was to ensure this competition. . . . This was a key reason behind directing GAO to monitor the source selection process. . . . I strongly believe it would be a mistake to rush to contract award prior to the Committee's receipt and review of the GAO's findings.

House *amici* district court brief, Exhibit 1.

---

sharply as something significant the defendant himself allegedly did as Ranking Minority Member. This particular overt act also echoes earlier ones alleged to be meetings on this subject. Indictment, Overt Acts, para. 9 at 21.

[5] The GAO serves as Congress's agent for legislative investigations. *Bowsher* v. *Synar*, 478 U.S. 714, 727–30, 737 (1986).

The GAO officially reported to the Defense Appropriations Subcommittee that the SINCGARS development program "has been plagued with production and reliability problems ever since the engineering development phase was bypassed in order to start initial production in fiscal year 1983." GAO, *Battlefield Automation: Army Command and Control Systems Acquisition Cost and Schedule Changes*, GAO/NSIAD–88–42FS at 19, December 1987.[6] Congress followed its Appropriations Committees' recommendations and deleted all but $10 million of the SINCGARS' $209 million budget request for fiscal year 1987.[7] In September 1987, the Army issued a request for a proposal to award a contract in May 1988 to a second source.

Throughout this developmental period, the Defense Appropriations Subcommittees maintained a continuing high level of bipartisan Congressional oversight over the SINCGARS program, because of its significance for military combat readiness, its high costs, and its plague of production and reliability difficulties. The multi-year legislative oversight process took on its typical forms: GAO reports, committee oversight hearings, reports, and correspondence, with the Count Three indicted Overt Act correspondence right in the middle of that process. That letter was written, as its discusses, because the GAO needed time to complete its pending study.[8] Broad Con-

---

[6] This particular GAO report notes, on its first page, that it was prepared at the request of Chairman Bill Chappell, Jr. of the Defense Appropriations Subcommittee—not his Ranking Minority Member, the indicted Representative.

[7] At one point it was expected to cost in excess of $6.5 billion. The Army approved the requests for the radios in 1974 and advanced development began in 1978. Initial production contracts were awarded to ITT Corporation in 1983 and 1985. After the program experienced difficulties in first article testing in 1985 and continued to experience problems in fiscal year 1986, the Army cancelled progress payments to the contractor. *See* GAO reports cited *infra*.

[8] Between 1985 and 1988 GAO reported to the Appropriations Committees on the continuing and evolving SINCGARS program problems

Continued

gressional oversight interest in SINCGARS, going far beyond this particular Ranking Minority Member, has continued unabated to the present time.[9] With the Indictment focuses on so classic and major a Congressional oversight activity, this case squarely poses the issue of indicting a Member for his role in committee oversight.

---

no less than five times. GAO, *Separate Army and Air Force Airborne SINCGARS Programs May Be Uneconomical*, GAO/NSIAD–85–50, January 31, 1985; GAO, *Battlefield Automation: Status of the Army Command and Control System Program*, GAO/NSIAD–86–184FS, August 1986 (requested by Chairman Ted Stevens and Chairman Bill Chappell, Jr.); GAO, *Battlefield Automation: Army Command and Control Systems Acquisition Cost and Schedule Changes*, GAO/NSIAD–88–42FS, December 1987 (requested by Chairman Bill Chappell, Jr.); GAO, *DOD Acquisition Programs: Status of Selected Systems*, GAO/NSAID–88–160, June 1988 (requested by Chairman Sam Nunn); GAO, *Combat Radios: Army's Selection of SINCGARS' Second-Source Contractor*, GAO/NSAID–88–200, July 1988 (requested by Chairman John C. Stennis and Chairman Bill Chappell, Jr.).

[9] GAO Reports: *Communication Acquisition: Army Still Needs to Determine Battlefield Communications Capability*, GAO/NSIAD–93–33 (November 1992) (requested by Chairman John P. Murtha); *1993 DOD Budget: Potential Reductions In Command, Control, and Communications Programs*, GAO/NSIAD–92–297BR (September 1992) (requested by Chairman Daniel K. Inouye and Chairman John P. Murtha); *Communications Acquisitions: Army Needs to Ensure Economy in SINCGARS Radio Procurement*, GAO/NSIAD–91–119 (June 1991) (requested by Chairman John P. Murtha); *Battlefield Automation: Army Tactical Command and Control System's Schedule and Cost*, GAO/NSIAD–91–118BR (April 1991); *Communications Acquisition: Issues Invoking Army's Single Channel Ground and Airborne Radio system* GAO/NSIAD–90–80BR (March 1990) (requested by Chairman Daniel K. Inouye and Chairman John P. Murtha).

Appropriations Hearings: *Department of Defense Appropriations for 1990, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on appropriations*, 101st Cong., 1st Sess., Part 6, 95–97, 102–104, 110–112 (1989); *Department of Defense Appropriations for 1992, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations*, 102d Cong., 1st Sess., Part 6, 504–506 (1991); *Department of Defense Appropriations for 1993, Hearings Before the Subcomm. on the Department of Defense of the House Comm. on Appropriations*, 102d Cong., 2d Sess., part 4, 101–103 (1992).

Without repeating Representative McDade's statement of the procedural background of the appeal, it may be briefly noted that when the Third Circuit panel affirmed the district court's decision not to dismiss the Indictment, one judge dissented in part (Scirica, J.), (A-51 to A-61), and that four judges dissented from the denial of Representative McDade's petition for rehearing *en banc.* (A-159 to A-160).

SUMMARY OF ARGUMENT

It is well established that the Speech or Debate protection of a Member of Congress against being "questioned in any other Place" forbids indicting him for his legislative activity, including his legislative activity in committee. Gratuities and conspiracies can be alleged in indictments of Members, but only so long as the indictment and trial do not "question" that which is legislative. *United States* v. *Helstoski,* 442 U.S. 477, 489 (1979); *United States v. Johnson,* 383 U.S. 169, 178 (1966). Now, the Third Circuit has split with the Eleventh Circuit on the fundamental issue of whether a Member's committee role and oversight activity are legislative in nature, with the Third Circuit holding in this case that they are not legislative.

This case warrants review for two reasons. The Court should resolve a split in the Circuits on a fundamental question of importance regarding the Congress's constitutional protections. Moreover, this Court should reinforce the protection given to Congressional oversight. *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491 (1975).

REASONS FOR GRANTING THE WRIT

1. The Third Circuit has Split with the Eleventh Circuit Regarding an Important Constitutional Question Concerning the Separation of Powers.

In *United States* v. *Helstoski,* 442 U.S. 477, 489 (1979), and *United States* v. *Johnson,* 383 U.S. 169, 178 (1966), this Court firmly established that the Speech or Debate Clause protection for Members of Congress, while allow-

ing indictments for gratuities and conspiracies, forbids use in such indictments of matters that are legislative in nature. The Speech or Debate Clause, art. I, §6, cl. 2 provides that "for any Speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." Numerous Supreme Court cases have elucidated that the protection for "either House" includes the committees of either House. The Clause protects "the deliberative and communicative processes by which Members participate in *committee* and House proceedings with respect to the consideration and passage or rejection of proposed legislation. . . ." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 (1975) (emphasis added) (quoting *Gravel* v. *United States,* 408 U.S. 606, 625 (1972)). It is a well established Speech or Debate principle that "committee reports are also protected." *Hutchinson* v. *Proxmire,* 443 U.S. 111, 124 (1979); *accord, Doe* v. *McMillan,* 412 U.S. 306, 311 (1973); *Gravel* v. *United States,* 408 U.S. at 617.[10]

Accordingly, the Eleventh Circuit, in the case of Representative Swindall, *United States* v. *Swindall,* 971 F.2d 1531 (11th Cir. 1992), *cert. denied,* 114 S.Ct. 683 (1994), correctly followed this Court's principles regarding the fundamental constitutional principle protecting Congressional committees. *Swindall* held that "Speech or Debate" does not "allow reference to be made to [the Member's] committee memberships both in grand jury proceeding and at trial. . . ." 971 F.2d at 1543.[11] As the statement

---

[10] *See, e.g., Eastland,* 421 U.S. at 501–502 (committee investigations protected) ("Without exception, [the Supreme Court has] read the Speech or Debate Clause broadly to effectuate its purposes;" 408; *Gravel, 408 U.S. at 617* (committee hearings protected) (the Supreme Court has "plainly not taken a literalistic approach in applying the privilege").

[11] *Swindall* reversed three counts on which Representative Swindall had been convicted, because the prosecution had used his committee membership against him. The Department of Justice accepted the validity of the rule laid down, neither seeking rehearing nor petitioning for certiorari. Representative Swindall himself sought unsuccessfully

of the case lays out, this indictment of Representative McDade directly, broadly, and strongly violated *Swindall.* Each and every one of the indictment's five counts specifically alleges and relies on the Congressman's role as Ranking Minority Member on the House Subcommittee on Defense Appropriations and the House Small Business Committee.[12] No attempt was made by the indictment to charge only the receipt of gratuities, the conspiratorial communications, and the like, and to omit Representative McDade's role as committee Ranking Minority Member. On the contrary, both the district court and the panel unequivocally found that the prosecution would rely on Representative McDade's committee role.[13]

The Third Circuit expresses bluntly its readiness to split with the Eleventh Circuit over the *Swindall* principle. It starts by reprinting at length what *Swindall* says. *See, e.g.,* A–18 to A–19 (quoting *Swindall,* 971 F.2d at 1543):

> There are two reasons why the Speech or Debate Clause prohibits inquiry into a member of Congress committee assignments even if the member's specific legislative acts are not mentioned. First, our review of Supreme Court precedent convinces us that the privilege protects legislative status as well as legislative Acts.

After discussing *Swindall* at length, A–18 to A–19, the panel makes some attempts to characterize what it is refusing to follow in that opinion, but ultimately concludes

---

rehearing and certiorari, on issues involving the other counts in his case regarding which his committee memberships had not been used.

[12] If anything, *Swindall* presented less patent error than the prosecution's case now. In fact, the *Swindall* Indictment did not even *mention* Representative Swindall's committee status. "None of the ten counts of the Indictment referred directly to Swindall's committee memberships, however." 971 F.2d at 1540.

[13] The district court order noted: "The indictment itself includes references to Mr. McDade's committee positions, and the government admits that it intends to prove that Mr. McDade was able to use his status as the ranking minority member on two House committees. . . ." (A–70). The appellate panel recognized that "in this case the indictment relies on the defendant's committee status. . . ." (A–24).

the lengthy Part III of its opinion by holding that "If . . . [the *Swindall*] court meant to embrace the proposition that the Speech or Debate Clause broadly prohibits proof of legislative or committee status, we would be compelled, for the reasons already explained, to disagree." (A–26).

It requires little exegesis to show the exceptional importance of the Third Circuit's decision in Representative McDade's case to disagree with the Eleventh Circuit's decision in Representative Swindall's case. First, the issue itself concerns not some mere detail of statutory interpretation or even of constitutional penumbra, nor some narrow rule among the multitude that govern the broad range of governmental actions. This is an aspect of constitutional law going to the heart of the separation of powers, concerning a direct clash between the Executive and Legislative Branches over whether the Executive Branch can use the Members' role in committees—the chief structure of the Congress—to indict them.

As explained in a much-quoted passage in *United States* v. *Johnson,* 383 U.S. 169, 178 (1966), the Speech or Debate "privilege has been recognized as an important protection of the independence and integrity of the legislature" and as "reinforcing the separation of powers so deliberately established by the Founders." Its highest function is "protecting against possible prosecution by an unfriendly executive" as "one manifestation of the 'practical security' for ensuring the independence of the legislature." *Id.* at 179. The split created by the Third Circuit is located where the Executive Branch can exercise the greatest intimidation against Members of Congress, by multi-count felony indictments pervasively utilizing the offending matter. It leaves the Congress in the untenable situation that whether its Members are protected in their committee role depends on the Circuit in which they might be indicted, sued, subpoenaed, or otherwise subjected to being "questioned in any other Place."

The reasons suggested by the Third Circuit for upholding the use made of Representative McDade's committee

role are not reasons to view lightly the damage done to the separation of powers. It does not matter whether the stated purpose for indicting a Member regarding his committee role is to prove someone's "state of mind." This issue in this case is not the hearsay rule; a Member has been "questioned in any other Place" once he is indicted, regardless of the purpose of the indicting. Equally, it does not matter whether the prosecutor declares the Congressional committee to be a "victim," with the indictment as a way of saving or helping the Congress. The Speech or Debate protection never depended on the Executive Branch's avowals of desires to assist the Legislative Branch, but on the crossing of the constitutional lines meant to protect the Congress. Once Members of Congress must consider the law to be that a grand jury could use their committee role against them, exposing them for that committee role to multi-count felony and RICO indictments, they must consider themselves divested of a key element of the protection of the Speech or Debate Clause.

A split in the circuits over a question of this importance warrants resolution by this Court.

2. This Court Should Repair the Damage Done to the Protection For Congressional Oversight.

This Court has recognized the vital importance for the constitutional and democratic operation of government for Congressional oversight to receive its constitutional protection, and this case warrants review to reinforce that protection. As the Court held in *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 505 (1975), "To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the 'integrity of the legislative process.'" This Court has often described the high importance of that investigative oversight process.

For example, in *Sinclair* v. *United States,* 279 U.S. 263, 297–98 (1929), a Senate committee, like the Defense Ap-

propriations Subcommittee here probing SINCGARS, was investigating a defense department (in *Sinclair*, the Navy), and like the Defense Appropriations Subcommittee, the *Sinclair* committee's focus of questioning was whether the Navy had been carrying out the law or going a wasteful way of its own. The Court sustained completely such constitutional oversight by a Congressional committee:

> The question propounded was within the authorization of the committee and the legitimate scope of investigation to enable the Senate to determine whether the powers granted to or assumed by the Secretary of the Interior and the Secretary of the Navy should be withdrawn, limited, or allowed to remain unchanged.

Id. at 298. The Court in *Sinclair* thus approved the validity of committee oversight by a committee, holding that "'the two Houses of Congress, in their separate relations, possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective,'" *Id.* at 291 (*quoting McGrain* v. *Dougherty*, 273 U.S. 135, 173 (1929)). The *Sinclair* Court recognized that "the power of inquiry is an essential and appropriate auxiliary to the legislative function." *Id.*

Indeed, the Supreme Court has long recognized that "[t]he power of the Congress to conduct investigations is inherent in the legislative process." *Watkins* v. *United States*, 354 U.S. 178, 187 (1957). *Watkins* stated that:

> That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. . . . It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

Id.[14] Nowhere do "inquiries concerning the administration of existing laws" involve a subject more important to

[14] The Court in *Watkins* saw the fundamental "danger to effective and honest conduct of the Government if the legislature's power to

the national security and the proper use of the resources appropriated for that security than in the annual cycle of oversight of defense appropriations. At the center of a Congressional committee's constitutional oversight task is the work of the Defense Appropriations Subcommittee addressed in this Indictment, namely, the Subcommittee's inquiries as to whether a department, such as the Defense Department, is carrying out recent laws.

Part of what drove the sharp division in the Third Circuit—the four judges who voted for rehearing *en banc,* and the division in the panel—may well have been the recognition of the injury to Congressional oversight from the decision of the divided panel. Two judges (Alito, J., and Bassler, D.J.) had refused even to consider a key aspect of the appeal—the Representatives's acts of oversight—but one Judge (Scirica, J.) dissented at length on this issue as well as voting with three other judges to grant rehearing *en banc.* As Judge Scirica explained:

> I would hold that true legislative oversight falls within the protection of the Speech or Debate Clause. . . . [W]e have jurisdiction to decide whether overt acts in the indictment violate the Speech or Debate Clause. . . .
>
> The majority holds that jurisdiction to determine whether overt acts challenged on Speech or Debate grounds should be stricken "does not satisfy the requirement that the right at issue . . . be jurisdictionally 'important'". . . . I respectfully disagree.

(A–52).

As Judge Scirica explains, Congressional oversight serves a vital and constitutionally protected purpose:

> Generally speaking, oversight is the way Congress evaluates legislation, and in the appropriate manner, monitors the operations of executive departments and agencies. Properly done, oversight is part of our system of checks and balances. The term covers a range of formal and informal activities, of which some may be privileged.

---

probe corruption in the executive branch were unduly hampered." *Id.* at 194–95.

(A–56). Judge Scirica explained the importance of judicial review to protect against such inclusion of Speech or Debate matter in the indictment. (A–52 to A–61). Such protection was "the conscious choice of the Framers' buttressed and justified by history." (A–60 to A–61) (dissenting opinion (quoting *Eastland,* 421 U.S. at 510) (quoting, in turn, *United States* v. *Brewster,* 408 U.S. 501, 516 (1972)).

Helstoski v. *Meanor*, 442 U.S. 50, 508 (1979) stated that "[i]f a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the [Speech or Debate] Clause his . . . challenge . . . must be reviewable before . . . exposure . . . occurs.' *Abney, supra*, 431 U.S. at 662, 97 S.Ct. 2042." In allowing Members a pre-trial appeal, this Court reasoned:

> We agree that the guarantees of that Clause are vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require.

Helstoski, 442 U.S. at 506. In this case, while the Representative, the *amici*, the dissent, and even the prosecution [15] all recognized that *Helstoski* v. *Meanor* necessitates that Congress receive the protection of such pretrial review of the indictment for such acts of legislative oversight, the divided panel refused to do so. Instead, it held:

> The question whether the two overt acts should have been stricken . . . does not satisfy the requirement that the right at issue in a collateral order appeal must be jurisprudentially "important". . . .

(A–48). The divided panel chose this method for overlooking that patent flaw in the Indictment, a flaw that the prosecution all but conceded to exist. (A–55, n.3) (dissent-

---

[15] The majority noted the prosecution's position when observing: "the parties and the amici in this case seem to assume" that this "ruling under the Speech or Debate Clause is appealable," (A–47).

ing opinion). Exploitation of this new doctrine would allow prosecutors most of what this Court's *Helstoski* decisions meant to preclude.

CONCLUSION

This case presents issues of fundamental importance to Congress and the separation of powers, on which the circuits have split and vital doctrines of this Court have been undermined. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS J. SPULAK,
General Counsel.
CHARLES TIEFER (Counsel of Record),
Deputy General Counsel and Solicitor.
RICHARD P. STANTON,
LENORE D. DICK,
Assistant Counsels.
U.S. House of Representatives,
The Capitol, H–112,
Washington, D.C. 20515.
(202) 225–9700
Attorneys for the Speaker and Bipartisan Leadership Group.

DECEMBER 1994.

○